

Claimant settled his claim on March 29, 1995 based upon a 7.5 percent functional impairment. Claimant then sought review and modification of the agreed running award as to the nature and extent of claimant's disability. The ALJ denied that request. Claimant

contends the award should be modified to grant a work disability. Claimant also seeks an award for his attorney's fees if there is no award of additional disability compensation. Respondent, its insurance carrier and the Fund seek review of the award of attorney fees to claimant's attorney.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the award by the ALJ should be affirmed. The Appeals Board agrees with the ALJ's analysis of the evidence as set forth in the award and adopts the findings and conclusions contained therein as its own.

Claimant suffered a back injury in 1988 while working. That claim was settled. Thereafter, claimant worked for respondent as a truck driver. This claim arises from a 1994 aggravation. Afterwards, claimant quit his job with respondent alleging that portions of his job duties placed him at risk for reinjury. The record does not establish whether his job exceeded any medically imposed work restrictions. Claimant alleges he is entitled to modification of his original disability award, which was based upon his functional impairment, to an award based upon a higher work disability. Respondent denies claimant's allegation that it was not willing to accommodate claimant and further denies that claimant's job required him to exceed his restrictions.

The Appeals Board finds that claimant's condition did not necessitate he leave his job. Furthermore, his work did not violate any specific restrictions. Claimant voluntarily resigned his position. Accordingly, he retains the ability to perform that job and is not entitled to a work disability award. But if claimant's condition does prevent him from returning to his job as a truck driver for respondent, it is not due to any change in his physical condition. Instead, it is the result of his condition as it existed on the date of his settlement. Claimant did not attempt to return to his regular duty work before he settled. If claimant misjudged his physical ability in settling his claim for functional impairment, he cannot rectify his error by review and modification because that procedure requires a change in claimant's condition. See, Brandt v. Kansas Workers Compensation Fund, 19 Kan. App. 2d 1098, Syl. ¶ 2, 880 P.2d 796, rev. denied 256 Kan. 994 (1994).

A modification due to a changed condition cannot be made without comparing claimant's condition at the time of the agreed award with his condition at the time modification is sought. Gile v. Associate Co., 223 Kan. 739, 741, 576 P.2d 663 (1978). The record includes certain reports by Dr. A. B. Manguoglu. Those reports primarily pertain to changes in claimant's condition between his 1988 injury and the settlement of this claim for the subsequent aggravation. They do not evidence a change in claimant's condition between the date of the settlement and the application for review and modification. Similarly, Dr. C. Reiff Brown attributes claimant's condition to a degenerative condition that largely pre-existed claimant's 1994 accident and offered no new restrictions or impairment due to any worsening after the March 29, 1995 settlement. Absent a change

in claimant's physical condition, the same medical evidence that supported a finding of no work disability cannot subsequently form the basis for a work disability. Watkins v. Food Barn Stores, Inc., 23 Kan. App. 2d 837, 936 P.2d 294 (1997).

Claimant requested his attorney's fees be awarded paid by respondent for this post-award proceeding for review and modification pursuant to K.S.A. 44-536(g). The ALJ granted this request but the respondent and Fund have appealed that portion of the award. Claimant was awarded his attorney's fees in the amount of \$2,250 based upon 30 hours of work at the rate of \$75 per hour. Respondent and the Fund do not dispute the number of hours requested nor the hourly rate. Respondent does dispute there being any award against it for attorney's fees because of the evidence against this being a case where review and modification is merited.

K.S.A. 44-536(g) provides in part:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, . . . such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund."

Effective July 1, 1997 K.S.A. 44-536(g) was amended to read:

"If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent."

Respondent argues that the July 1, 1997 amendment is applicable in this case because the statute is remedial and, therefore, should have retroactive application. Respondent argues that since, under the new version of the statute, allowance of an attorney fee is not mandatory, then one should not be ordered in this case. The Appeals Board agrees the 1997 amendments apply but finds that claimant would be entitled to an award of attorney fees under either version of the statute. The general rule is that a statute operates prospectively absent clear language that it is to operate retrospectively. See Harding v. K.C. Wall Products, Inc., 250 Kan. 655, Syl. ¶ 4, 831 P.2d 958 (1992). This rule may be modified when the change is merely procedural. But even procedural changes cannot affect the vested rights of the parties. Lakeview Village, Inc., v. Board of Johnson County Comm'rs, 232 Kan. 711, 720, 659 P.2d 187 (1982). See also, Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 883 P.2d 1177 (1994).

"In workers compensation cases, the law in affect at the time of the injury covers the rights and obligations of the parties." Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, Syl. ¶ 8, 936 P.2d 297, rev. *denied* 262 Kan. ____ (1997). In the case of attorney fees, it is the date of the contract that controls which version of K.S.A. 44-536(g) is applicable. May v. University of Kansas, 25 Kan. App. 2d 66, 957 P.2d 1117 (1998).

It would seem that the 1997 amendments to K.S.A. 44-536(g) would not apply because the changes could affect the vested rights of the parties. But in May, the Court of Appeals held the amendments to K.S.A. 536(g) merely "tend to clarify the pertinent provisions of the statute rather than change it." In that case, the pertinent provisions of the statute the parties were concerned with were not the same as in this case. Nevertheless, our reading of the Court of Appeals decision in May is to the effect that the 1997 amendment to K.S.A. 44-536(g) is to be retroactively applied. Although unsuccessful, the post-award attorney services in this case involved a claim for additional benefits. Those services were reasonable and necessary to prove the desired result. Therefore, the Appeals Board finds that claimant is entitled to an award of attorney's fees. The amount awarded by the ALJ is reasonable and is approved.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the October 1, 1997 Review & Modification Award entered by Administrative Law Judge Bruce E. Moore, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: M. John Carpenter, Great Bend, KS
Jerry M. Ward, Great Bend, KS
Richard L. Friedeman, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director